UNITED
NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 847

Case No. 933: WYSS

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Mayer Gabay; Mr. Julio Barboza;

Whereas, on 31 July 1996, Elisabetta Wyss, a staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application containing, inter alia, the following pleas:

> "8. ... that the UNAT quash the purported decision of the Secretary-General to defer the recommendation of the ... Joint Appeals Board (JAB) dated 23 January 1996, ..., and to quash the subsequent purported decision of the Secretary-General (...) on 6 May 1996 (...) to reject the Applicant's further request (...) that the recommendation of the JAB be either unequivocally accepted or rejected. ...
>
> 9. ... that the Tribunal order the Secretary-General to strictly implement and execute the conclusion and recommendation of the JAB (i.e., that the Applicant's effective date of promotion be set as 1 July 1991, ...), and/or in the alternative, to award the Applicant compensation, costs, and damages for the injuries she suffered from the denial of due process, procedural and ... inexcusable delay ... in resolving her appeal, ..."

Whereas the Respondent filed his answer on 17 December 1996;

Whereas the Applicant filed written observations on 26 March 1997;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNHCR on 9 September 1974, as a Clerk/Typist on a short-term appointment for two months, which was followed by further short-term appointments until 1 June 1975, when she was given a one-year fixed-term appointment as a Bilingual Typist/Clerk at the G-3, step III level in the Fund Raising Section, External Affairs Division, UNHCR. Her appointment was subsequently extended and, on 1 October 1976, she was promoted to the G-4 level. On 1 November 1977, the Applicant's functional title was changed to Administrative Clerk. On 1 January 1978, her appointment was converted into an indefinite appointment. On 1 August 1978, the Applicant was promoted to the G-5 level and, on 1 May 1981, to the G-6 level, with a change in her functional title to Principal Administrative Clerk. On 6 May 1982, the Applicant was transferred to the Assistance Division, Procurement Unit, and her functional title was changed to Principal Procurement Clerk. On 16 June 1987, the Applicant was reassigned to the Regional Bureau for South West Asia, North Africa and the Middle East (SWANAME), as a Programme Assistant. On 1 January 1992, her functional title was changed to Senior Programme Assistant. On 1 July 1992, she was promoted to the G-7 level.

The Applicant had been recommended for promotion to the G-7 level by her successive supervisors on several occasions since 1989. In a memorandum to the Chairman, Appointments, Promotions and Postings Committee (APPC), dated 28 April 1989, the Desk Officer, Afghanistan and Pakistan, recommended the Applicant for promotion to the G-7 level, underlining her efficiency, competence and potential managerial and problem-solving skills. On 23 May 1990, a similar recommendation from the Director, Regional Bureau for SWANAME, was sent to the Secretary of the APPC. The results of the

reclassification exercise of Programme Assistant posts were published under cover of a memorandum from the Director, Division of Human Resources Management (DHRM), dated 28 October 1991. The post encumbered by the Applicant was classified at the G-7 level, with effect from 1 July 1990.

The grading of the Programme Assistant posts was considered during the Special APPC Session undertaking held in conjunction with the 1991 Annual APPC Promotion Review Session. The Applicant's name was not included in the list of staff promoted to the G-7 level circulated under cover of a memorandum dated 3 April 1992. On 9 April 1992, the Applicant wrote to the Chairman of the APPC, enquiring about the reason for her non-promotion to the G-7 level, since her post had been classified at that level. In a reply dated 10 April 1992, the Secretary of the APPC transmitted the excerpt of the relevant paragraph of the APPC Minutes concerning the recommendation for the Applicant's promotion. The excerpt stated that "[t]he Committee felt unable to promote any G-6 staff members in the SWANAME Bureau to the detriment of another Bureau[']s] quota."

On 14 April 1992, the Applicant lodged a recourse with the Chairman of the APPC. She enclosed a "Note for the File" dated 27 March 1992, in which the Director, DHRM, stated that "Promotion possibilities to the G-7 level for Programme Assistants working in a given Bureau should not be limited to the number of G-7 Programme Assistant posts in that Bureau".

On 18 May 1992, the Applicant wrote to the Chairman of the Staff Council concerning the unbalanced representation of the APPC members designated by the Staff Council among the APPC Recourse Session for promotion of Programme Assistants at Headquarters. On 25 May 1992, the Director, DHRM, addressed a memorandum to the Chairman of Staff Council on this matter, explaining that the three persons designated by the Staff Council were not entitled to sit in sessions dealing with promotion or recourse to the G-7 level in view of their grade.

On 1 June 1992, the Secretary of the APPC informed the Applicant that the APPC had decided to maintain the decision not to recommend her for promotion.

On 27 July 1992, the Applicant wrote to the Secretary-General, requesting a review of the administrative decision not to promote her to the G-7 level.

In the meantime, the results of the 1992 Annual APPC Session were published under cover of an Inter-Office Memorandum dated 23 October 1992. The name of the Applicant was included on the list for promotion to the G-7 level, with effect from 1 July 1992. The Applicant was informed accordingly on 26 October 1992.

The Applicant lodged an appeal with the Joint Appeals Board (JAB) on 1 December 1992. The JAB adopted its report on 23 January 1996. Its findings, conclusion and recommendation read, inter alia, as follows:

"...

29. The members of the Panel, having considered the case, noted some facts that constituted irregularities in the procedure followed by the APPC:

(a) It appears that there was an unbalanced composition of the APPC during the Special Session of April 1992. The Committee justified this unbalance by the fact that members graded under G-7 could not participate [in] this Special session dealing with promotion to [the] G-7 grade.

(b) The members of the Panel noticed that the APPC did not justify why it did not apply the Note for the File of 27 March 1992 jointly signed by the then Director, DHRM and the Chairman of the Staff Council, stating that 'promotion possibilities to the G-7 level for Programme Assistants working in a given Bureau should not be limited to the number of G-7 Programme Assistants in that Bureau ...'

30. In the opinion of the Panel, a relevant fact of this case concerns the reclassification of the Appellant's post from G-6 to G-7, [which was] notified to the staff member on

28 October 1991 under cover of a memorandum from the then Director, DHRM, specifying that the effective date of reclassification of her post was 1 July 1990. At the 3 April 1992 Special Session, the APPC refused to recommend the Appellant for promotion on the grounds that there was already a G-7 post in that Bureau, without apparently taking into consideration the recent reclassification of the Programme Assistant post. ...

31. When the Appellant was finally promoted on 23 October 1992, she was notified that the effective date of her promotion would be 1 July 1992. The Panel realizes that the classification of the post, the date of its effectiveness and the grade of the staff member performing may not be identical. Furthermore, if the Secretary-General decides to promote a staff member, he has a discretionary authority to determine the effective date of promotion. Regarding this specific point, the Panel believes that if the APPC had examined all the relevant elements at the Special Session on 3 April 1992, it could have recommended the Appellant for promotion at the same effective date as the other staff members recommended for promotion at this Session. Thus the Appellant would have been promoted with effect... [from] date 1 July 1991.

Conclusion and recommendation

32. The Panel concludes that, although promotion is not a right for the staff member and the Secretary-General has a discretionary power on promotion, the APPC when recommending an effective date of promotion had not examined all the relevant elements of the file.

33. In view of the foregoing, the Panel recommends that the Appellant's effective date of promotion be 1 July 1991, i.e. the effective date adopted for the other staff members promoted by the APPC at its 3 April 1992 Special Session.

Special Remark

34. The Panel wishes to draw the attention of the APPC [to] the importance of acting in strict compliance with its mandate, particularly regarding procedural matters."

On 22 February 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed her as follows:

> "The Secretary-General has examined your case in the light of the Board's report and accepts its finding that the Appointment Promotions and Postings Committee, (APPC), Special Session of 3 April 1992 had not examined all relevant elements of your case, in particular those determining whether the effective date of your promotion should have been 1 July 1991 or 1 July 1992. However, the Secretary-General cannot agree with the Board's finding that the date of 1 July 1991 should apply, because determination of this issue falls under the exclusive competence of the APPC, before the final decision of UNHCR's High Commissioner. For this reason, the Secretary-General has decided to reject the Board's recommendation and has deferred your case to UNHCR's High Commissioner so that she may submit your appeal to the APPC to consider the effective date when your promotion should become effective, giving in this process all due consideration to your arguments and to the JAB's comments.
>
> ..."

On 12 April 1996, the Applicant requested the High Commissioner not to submit the Applicant's case to the APPC but to take a decision on the JAB's recommendations.

On 6 May 1996, the Senior Legal Adviser, DHRM, UNHCR, rejected the Applicant's request. The case was subsequently remanded to the APPC, which made no recommendation in support of the appeal. This conclusion was accepted by the High Commissioner, who decided to maintain 1 July 1992 as the effective date of the Applicant's promotion.

On 31 July 1996, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Applicant would have been promoted to the G-7 level with effect from 1 July 1991, but for the procedural and substantive irregularities occurring at the Special Session of the APPC of April 1992.

2. The Secretary-General's failure to take a decision on the JAB's recommendation was an abuse of discretion.

Whereas the Respondent's principal contention is:

The Secretary-General's decision to remand the Applicant's case to the UNHCR APPC did not violate the Applicant's rights.

The Tribunal, having deliberated from 11 to 25 November 1997, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board (JAB) that her promotion be implemented with effect from 1 July 1991. The Applicant challenges the recommendation of the Appointments, Promotions and Postings Committee (APPC) to recommend her for promotion to the G-7 level, with effect from 1 July 1992. She claims that the recommendation for her promotion was not objectively considered by the APCC at its Special Session due to its irregular composition.

II. The Applicant is not requesting the Tribunal to substitute its own judgement for that of the Secretary-General by promoting her to the G-7 level, since she received this promotion on 1 July 1992. Instead, she is contesting the effective date of this promotion. Therefore, the central issue in the case is whether the Applicant's rights were violated by the administrative decision not to grant her the promotion to the G-7 level with effect from 1 July 1991, instead of 1 July 1992.

III. The Applicant contends that the Special Session of the APPC of April 1992 was tainted by procedural and substantive irregularities. With respect to the procedural irregularity, the Tribunal notes that the Secretary-General, in the JAB proceeding, admitted that the composition of the Special Session was in fact irregular. Further, the Respondent, in his submission before the

IX. All other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Mayer GABAY
Member

Julio BARBOZA
Member

New York, 25 November 1997

R. Maria VICIEN-MILBURN
Executive Secretary